IN THE HIGH COURT OF BOMBAY AT GOA, PANAJI-GOA

CRIMINAL MISC. APPLICATION NO.236 OF 2006
IN
STAMP NUMBER MAIN NO. 1447 OF 2006

M/s Steel Yard of Mapusa,
through its Partner,
Shri Balkrishan Vishwanath Parulekar,
of full age, resident of Mapusa,
Bardez-Goa. .... Applicant

Versus

Shri Alfred Cotta,
the Partner of M/s. Mac Construction,
1st Floor, Mamai Kamat Building,
Opposite Secretariat,
Panaji-Goa. .... Respondent

Shri M.S. Sonak, Advocate for the Applicant.

Shri A. Monteiro, Advocate for the Respondent.

CORAM: **N. A. BRITTO, J.**

DATE: **26th July, 2006**

ORAL ORDER

The complainant is seeking special leave to appeal against the acquittal of the accused under Section 138 of the Negotiable Instrument Act, 1881 (Act, for short).

2. Heard Shri Sonak, the learned Counsel on behalf of the complainant and Shri Monteiro, the learned Counsel on behalf of the accused.

3. The complainant had prosecuted the accused for bouncing of two cheques one dated 20/12/1996 for a sum of Rs. 1,53,669/- and the other dated 30/12/1996 for a sum of Rs. 1,44,892/-. There is no dispute that the complainant having served the statutory notice upon the accused, and on his failure to comply the same filed the complaint under Section 138 of the Act.

4. The learned JMFC by his Judgment/Order dated 12/05/2003 convicted and sentenced the accused under Section 138 of the Act, to undergo 3 months SI and to pay compensation of Rs. 4,87,697.92. The accused filed an appeal before the Court of Sessions but the learned Additional Sessions Judge by her Order dated 13/03/2006 allowed the appeal and set aside the conviction and sentence imposed upon the accused.

5. There is no dispute that the accused was one of the partners of the firm known as “Mac Constructions”. There were other three partners

who were the brothers of the accused. The said cheques were issued on behalf of the said firm and were signed on behalf of the said firm by other partners namely Edgar Cotta and Edwin Cotta. The accused had merely handed over the said cheques on behalf of the firm to the accused. The controversy between the parties ultimately boiled down to provisions of Section 141 of the Act. The Complainant did not prosecute the said firm nor the said partners who had drawn the said cheques on behalf of the said firm but prosecuted the accused alone. The accused had also led evidence in support of the plea taken by him that he was merely a sleeping partner and was not in-charge of and was responsible to the said firm for the conduct of its business.

6. The learned Additional Sessions Judge referred to the Judgments of the Supreme Court in the case of ***Monaben Ketanbhai Shah & Anr.*** **Versus** ***State of Gujarat*** (AIR 2004 SC 4274) and ***SMS Pharmaceuticals Ltd.*** **Versus** ***Neeta Bhalla & Anr.*** (2005 AIR SCW 4740) and found that it was necessary for the complainant to have specifically alleged in the complaint that the accused was being prosecuted as a partner of the said firm being in-charge of and responsible for the conduct of business of the said firm at the time the offence was committed and which

allegation or averment was essential for the accused to be prosecuted with the aid of Section 141 of the Act. The learned Additional Sessions Judge noted that the Complainant had brought on record the deed of partnership to contend that the accused was one of the partners of the said firm, but the same was of no consequence in the absence of the allegations in the light of Section 141 of the Act.

7. On behalf of the accused and to support the correctness of the view held by the learned Additional Session Judge, Shri Monteiro on behalf of the accused has referred to the Judgment of the Apex Court in the case of SMS Pharmaceuticals Ltd. (supra) and to the case of ***Monaben Ketanbhai Shah & Anr. Versus State of Gujarat*** (2004 SCC (Cri) 1857)/(AIR 2004 SC 4274). In the case of ***SMS Pharmaceuticals Ltd.***, Supreme Court now speaking through three learned Judges has held that it is necessary to specifically aver in the complaint, under Section 141 of the Act, that the accused at the time the offence was committed was in-charge of and responsible for the conduct of the company and the said averment is an essential requirement of Section 141. The Apex Court in the case of ***Monaben Ketanbhai Shah & Anr.*** (supra) has again observed that it is not necessary to reproduce the language of Section 141 verbatim in the

complaint since the complaint is required to be read as a whole. If the substance of the allegations made in the complaint fulfill the requirements of Section 141, the complaint has to proceed and is required to be tried with. It is also true that in construing the complaint a hypertechnical approach should not be adopted so as to quash the same. The laudable object of preventing bouncing of cheques and sustaining the credibility of commercial transactions resulting in enactment of Sections 138 and 141 has to be borne in mind. These provisions create the statutory presumption of dishonesty, exposing a person to criminal liability if payment is not made within the statutory period even after issue of notice. The Apex Court also observed that the filing of the partnership deed of the constitution of the firm is of no consequence for determining the point in issue since Section 141 of the Act does not make all partners liable for the offence and the criminal liability has to be fastened on those who, at the time of the commission of the offence, were in charge of and were responsible to the firm in the conduct of the business of the firm.

8. Admittedly the Complainant did not make the firm as a party accused nor the partners who had drawn the cheques on behalf of the firm, as accused but chose to make one of the partners of the said firm, who had

brought and delivered the cheques to the complainant, as accused without making any specific averment that the accused as the partner was in-charge of or responsible for the conduct of the business of the said firm. A person other than a company, when an offence is committed by the Company, can be proceeded against only if that person was in charge of and was responsible to the company for conduct of its business. What is required for holding a person vicariously liable in terms of Section 141 of the Act for the offence under Section 138 is the actual role played by such person in the management committed by a company in the conduct of the business of the company. Here was a case where the Complainant did not aver that the accused as a partner of the said firm was in-charge of and was responsible for the conduct of the business of the said firm. On the contrary, the accused had led sufficient evidence to show that the accused was a sleeping partner of the said firm and the said evidence could not have been simply brushed aside by the learned Additional Session Judge in the manner done by her on the ground that the plea that the accused was a sleeping partner was not put to the Complainant. It had to be noted that the accused had cross-examined the complainant in person without of the assistance of an Advocate and might have not known the required legal intricacies.

9. In my view, the view held by the learned Additional Sessions Judge in acquitting the accused under Section 138 of the Act cannot be faulted.

10. This is not a fit case for granting of special leave. Application dismissed.

N. A. BRITTO, J.

NH